In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, APPELLANT

v.

ROBERT WILLIAM KRAS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

INDEX TO APPENDIX

RELEVANT DOCKET ENTRIES

No. 71-8-973 in Bankruptcy

Date 1971	
September 13	Notice of Claim of Unconsitutionality dated 5/28/71 filed
	Motion for leave to file petition and proceed in bankruptcy without payment of any of the filing fees as a condition precedent to discharge in bankruptcy dated 5/28/71 filed.
	Affidavit in support of above motion, under the In Forma Pauperis Statute, 28 U.S.C. Sec. 1915(a) etc. filed
	Notice of Motion of U.S.A. to intervene, etc. filed
	Decision and order filed. For the reasons set forth it is ORDERED that petitioner's motion for leave to file his petition in bankruptcy without prepayment of any of the filing fees is granted and the Clerk of this Court is directed to accept said petition for filing and to refer same to a Referee, etc.
September 30	Above paper sent to Referee Price
October 8	Notice of Appeal filed

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of	In Bankruptcy No.
ROBERT WILLIAM KRAS, Petitioner in Bankruptcy	NOTICE OF CLAIM OF UNCONSTITUTIONALITY

NOTICE is hereby given, pursuant to Rule 24 of the General Rules of United States District Courts for the Southern and Eastern Districts of New York, of this petitioner's claim before the referee in bankruptcy that provisions of the federal bankruptcy law which condition a discharge in bankruptcy upon the payment of the filing fees, Bankruptcy Act, 11 U.S.C. §§ 32(b)(2), 32(c)(8), 95(g), and U.S. Supreme Court General Order in Bankruptcy 35(4), violate this petitioner's Fifth-Amendment rights of due process and equal protection

Dated: New York, New York
May 28, 1971

/s/ Kalman Finkel
MORTON DICKER, Esq., and
KALMAN FINKEL, Esq.
Attorneys for Petitioner
The Legal Aid Society
267 West 17th Street
New York, New York 10011
691-8320

[Title Omitted in Printing]

MOTION FOR LEAVE TO FILE PETITION AND PROCEED IN BANKRUPTCY WITHOUT PAYMENT OF ANY OF THE FILING FEES AS A CONDITION PRECEDENT TO DISCHARGE IN BANKRUPTCY

Now comes the petitioner in bankruptcy and moves for leave to file his petition and proceed in bankruptcy without payment of any of the filing fees as a condition precedent to discharge, as he is unable to pay or promise to pay the fees even in small installments and also provide for the day-to-day necessities of himself and his dependents.

Dated: New York, New York
May 28, 1971

[Signature of Counsel Omitted]

[Title Omitted in Printing]

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION AND PROCEED IN BANKRUPTCY WITHOUT PREPAYMENT OF THE FILING FEES AS A CONDITION PRECEDENT TO DISCHARGE, UNDER THE *IN FORMA PAUPERIS* STATUTE, 28 U.S.C. § 1915(a), OR, IN THE ALTERNATIVE, ON THE GROUNDS OF THE UNCONSTITUTIONALITY OF THE FILING FEE REQUIREMENT AS APPLIED TO THIS PETITIONER

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROBERT WILLIAM KRAS, being duly sworn, deposes and says:

1. I am the petitioner in bankruptcy in this proceeding and make this affidavit in support of my motion for leave to file my petition in bankruptcy and proceed to discharge without prepayment of any of the filing fees, under the federal *in forma pauperis* statute, 28 U.S.C. § 1915(a), or, in the alternative, on the grounds of the unconstitutionality, as applied to me, of the filing fee requirement contained in the Bankruptcy Act, 11 U.S.C. §§ 32(b), 32(c)(8), 68(c)(1), 95(g), and General Order 35(4).

2. I reside in a 2½ room apartment with my wife and our two children, ages 5 years and 8 months, and my mother and her 6-year-old daughter. My 8-months-old son Jared has cystic fibrosis and is presently in Cumberland Medical Center undergoing treatment.

3. I have been unemployed since May, 1969, except for some odd jobs from which I earned approximately $300 in 1969 and $300 in 1970. My last steady job was as an insurance agent with the Metropolitan Life Insurance Company. I was discharged from Metropolitan in 1969 because premiums which I had collected were stolen from my home by an intruder and I was unable to make up the amount to Metropolitan. Metropolitan's claim against me has increased to $1012.64 and is one of the debts listed in my bankruptcy petition. I have diligently sought steady em-

ployment in New York City, but because of the bad references given by Metropolitan to prospective employers I have been unsuccessful. I attempted to find employment in Connecticut but was unsuccessful there as well and returned to New York City. My wife was employed until March, 1970, when she was forced to stop because of her pregnancy. All of her attention will now be devoted to caring for our son Jared, who is coming out of the hospital soon.

4. My wife and I and our two young children, together with my mother and her young child, subsist entirely on the $105 semi-monthly public assistance allowance for my family and the $78 semi-monthly public assistance allowance for my mother and her daughter. These welfare benefits are all expended as budgeted to pay for our rent—$102 per month—and the day-to-day necessities of our existence. I own no automobile, stocks, bonds, real estate, valuable personal property, savings account, or any other non-exempt assets under the bankruptcy law. I receive no unemployment or disability benefits. The sole assets which I possess are $50 worth of essential household goods and wearing apparel which are exempt from distribution in bankruptcy pursuant to 11 U.S.C. § 24 and CPLR § 5205. I also have a couch in storage on which are owed payments of $6 per month and which has negligible marketable value.

5. Because of my poverty, I am wholly unable to pay or promise to pay the filing fees, even in small installments, as a condition precedent to discharge and also provide myself and my dependents with day-to-day necessities. I have been unable to borrow money from my family, relatives, or friends. One of the debts of which I seek a discharge in bankruptcy is a loan from my wife's grandmother. The New York City Department of Social Services refuses to allot money for payment of the bankruptcy filing fees. I have no prospect of immediate employment.

6. I earnestly seek a discharge in bankruptcy of substantial indebtedness in the amount of $6428.69 in order to relieve myself and my family of the distress of financial insolvency and creditor harassment and in order to make a new start in life. It is especially important that I get a discharge of my debt to Metropolitan Life Insurance Company soon, because until that is cleared up Metropolitan will continue to falsely charge me with fraud and give me bad

references which prevent my getting employment. When I do get a job I want to be able to spend my wages for the support of myself and my family and for the medical care of my son, instead of paying them to my creditors and forcing my family to remain dependent on welfare.

6. I believe that I am entitled to a discharge in bankruptcy of all the debts except taxes listed in my petition, including the debt to Metropolitan Life Insurance Company.

7. I am represented in this proceeding without fee by Morton Dicker and Kalman Finkel of The Legal Aid Society.

WHEREFORE, I respectfully pray that this referee grants my motion for leave to file my petition in bankruptcy and proceed to discharge without prepayment of any of the filing fees.

/s/ Robert William Kras
ROBERT WILLIAM KRAS

Sworn to before me this 28th day of May, 1971.
/s/ Stephen Holbreich

STEPHEN HOLBREICH
NOTARY PUBLIC, State of New York
No. 52-1881530
Qualified in Suffolk County
Term Expires March 30, 1973

[Title Omitted in Printing]

MOTION OF THE UNITED STATES OF AMERICA TO INTERVENE

The United States of America, by its undersigned attorneys, pursuant to Rule 24 of the Federal Rules of Civil Procedure, hereby moves to intervene as a party in the above-entitled action on the ground that a statute of the United States confers an unconditional right to intervene, and moves that the United States be granted 45 days from the date on which the instant motion to intervene is granted within which to file a memorandum on the issues involved herein.

In support of this motion, the Court is respectfully referred to the proposed Intervenor's Complaint and Memorandum in Support of the United States of America's Motion to Intervene, filed herewith.

[Signatures of Counsel Omitted]

[Title Omitted in Printing]

ORDER

After due consideration, the motion of the United States of America to intervene as a party in the above-entitled proceedings is hereby granted and the United States is given 45 days from the date of this Order within which to file a memorandum on the issues involved in these proceedings.

Brooklyn, New York
July 2, 1971

/s/ Anthony J. Travia
United States District Judge

[The opinion and order of the district court are omitted. They may be found as an appendix to the Jurisdictional Statement, pp. 11-26.]

[Title Omitted in Printing]

ORDER

At Brooklyn, New York, in said district, on the 17th day of December, 1971:

IT APPEARING THAT Robert William Kras of Brooklyn, New York, in the County of Kings, State of New York, was duly adjudged a bankrupt on a petition filed by him on September 13, 1971 and that a notice of a first meeting of creditors on October 14, 1971 was mailed to all scheduled creditors of the bankrupt, and

IT FURTHER APPEARING THAT the United States of America obtained an order to show cause returnable on October 14, 1971 directing all interested parties to show cause why all further proceedings in the above-captioned bankruptcy action should not be stayed pending the decision of the United States Supreme Court in the appeal filed by the United States of America on October 8, 1971 from the order of the Honorable Anthony J. Travia, entered on September 13, 1971, directing the clerk to accept and file the petition in bankruptcy of Robert William Kras without prepayment of any filing fee; and

IT FURTHER APPEARING THAT the bankrupt, Robert William Kras, having opposed the application of the United States of America for a stay of all further proceedings in the above-captioned bankruptcy action and having requested that the bankrupt be allowed to proceed up to, but not including, the point of actual discharge pending the disposition of the appeal by the United States Supreme Court, and

IT FURTHER APPEARING THAT a hearing on the order to show cause was held on October 14, 1971, and that the United States of America, appearing by its attorney, ROBERT A. MORSE, United States Attorney for this district, Mary P. Maguire, Assistant United States Attorney, of counsel, consented to allowing the bankrupt, Robert William Kras, to proceed up to, but not including, the point of discharge pending the disposition of the appeal by the United States Supreme Court, it is

ORDERED that the bankrupt, Robert William Kras, shall be allowed to conduct all necessary proceedings in the

above-captioned bankruptcy action up to but not including the actual discharge of the bankrupt, and it is further

ORDERED that the discharge of the bankrupt, Robert William Kras, is stayed pending the disposition of the appeal by the United States Supreme Court.

/s/ Manuel J. Price
Referee in Bankruptcy

SUPREME COURT OF THE UNITED STATES

No. 71-749

UNITED STATES, *Appellant*,

v.

ROBERT WILLIAM KRAS

APPEAL from the United States District Court for the Eastern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 22, 1972

SUPREME COURT OF THE UNITED STATES

No. 71-749

UNITED STATES, *Appellant*,

v.

ROBERT WILLIAM KRAS

ON CONSIDERATION of the motion of the appellee for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

February 22, 1972

☆ U.S. Government Printing Office: 1972—459-891/556

INDEX

451-575——71—1

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

UNITED STATES OF AMERICA, APPELLANT

v.

ROBERT WILLIAM KRAS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion and order of the district court (App. A, *infra*, pp. 11–26)are not yet reported.

JURISDICTION

The United States intervened, pursuant to 28 U.S.C. 2403, in this bankruptcy proceeding because the constitutionality of sections of the Bankruptcy Act[1] which require the payment of a filing fee prior

[1] Sections 14(b) and 14(c) of the Bankruptcy Act, 11 U.S.C. 32(b), and (c)(8) provide for the payment of the required fees as a condition to discharge in bankruptcy. The amount of the fees, totalling $50, is specified in sections 40(c)(1), 48(c) and 52(a) of the Act, 11 U.S.C. 68(c)(1), 76(c), 80(a).

to discharge were drawn into question. The judgment of the district court declaring those provisions unconstitutional was entered on September 13, 1971 (App. A, *infra*, p. 11). A notice of appeal was filed on October 8, 1971 (App. B, *infra*, p. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

QUESTION PRESENTED

Whether the provisions in the Bankruptcy Act requiring the payment of a $50 filing fee as a precondition to discharge in voluntary bankruptcy proceedings are unconstitutional.

STATUTE AND ORDER INVOLVED

Pertinent provisions of the Bankruptcy Act, 11 U.S.C. 1 *et seq.*, and of this Court's General Order in Bankruptcy No. 35, are set forth in Appendix C, *infra* pp. 28–31.

STATEMENT

Appellee Kras filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of New York on May 28, 1971. Accompanying the petition was an affidavit stating that appellee was indigent and a motion for leave to proceed in bankruptcy without payment of the filing fees required as a precondition to discharge by the Bankruptcy Act, 11 U.S.C. 11 *et seq.* The appellee alleged that he supported his wife, two children, mother and his mother's small child on semi-monthly public assistance allowances of $183; that he had not been regularly employed since May, 1969; that he had no assets except $50 in exempt clothing and household

goods; and that he was "wholly unable to pay or promise to pay the filing fees, even in small installments * * *." He contended that the *in forma pauperis statute* (28 U.S.C. 1915) created an exception for indigents to the filing fee requirements of the Bankruptcy Act and that, if it did not, the latter requirements were unconstitutional. The United States intervened to defend the constitutionality of the filing fee requirements.

The district court held that the *in forma pauperis* statute did not create an exception to the filing fee provisions of the Act in favor of indigents, but further that "the statutory requirement of prepayment of a filing fee to obtain a discharge in bankruptcy violates the Fifth Amendment right of due process, including equal protection." (App. A, p. 21).[2]

THE QUESTION IS SUBSTANTIAL

The district court held unconstitutional a significant provision of a major act of Congress, namely, the requirement that a $50 filing fee be paid before a discharge in bankruptcy can be obtained. The constitutionality of this provision has been upheld in the only appellate ruling on the point. *In re Garland,* 428 F. 2d 1185 (C.A. 1), certiorari denied, 402 U.S. 966. There are several pending cases in which the constitutionality of the provision also is challenged.[3] This

[2] The case has been assigned to a referee in bankruptcy, who conducted the first meeting of creditors but stayed the discharge pending this appeal.

[3] In *In re Read* (Civil No. Bk-71-826), a referee in bankruptcy in the Western District of New York has held the fee provisions unconstitutional. A referee in the Southern District

Court should determine the constitutionality of this provision.

1. Sections 40(c)(1), 48(c) and 52(a) of the Bankruptcy Act respectively require the payment of $37 for the referees' salary and expense fund, $10 for the compensation of trustees, and $3 as a filing fee. General Order in Bankruptcy 35(4) permits the payment of these fees in installments over a six to nine-month period. Section 14(b)(2) of the Bankruptcy Act allows the discharge of a bankrupt only after "the filing fees required to be paid by this title have been paid in full * * *." Section 14(c) includes among the grounds upon which a discharge must be denied the "fail[ure] to pay the filing fees required to be paid by this title in full * * *." Section 14(c)(8). General Order in Bankruptcy 35(4) likewise provides that "[n]o proceedings upon the discharge of a bankrupt or debtor shall be instituted until the filing fees are paid in full."

Under the present compensation system—adopted by Congress in 1946 as part of a major revision of the Bankruptcy Act—these fees are paid into a Referee's Salary and Expense Fund in the Treasury and all referees' salaries and expenses are paid from that

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of New York has upheld the provisions. *In re Partilla* (Civil No. 71-B-380). The issue is pending in at least two other jurisdictions. *In re Miller*, C.A. 6, No. 20,059; *In re Hickey* (N.D. Miss., Civil No. DBk71-52). Two other district courts have held the filing fee provisions to be unconstitutional. *In re Smith*, 323 F. Supp. 1082 (D. Colo.); *In re Naron* (D. Ore., No. B-1527), decided November 29, 1971.

Fund.[4] Thus the fee provisions are designed to insure that the bankruptcy referee system is self-sustaining, as Congress has intended from the system's inception. See Sen. Rep. No. 959, 79th Cong., 2d Sess., p. 1. The Senate Committee report accompanying the legislation specifically noted that amended Section 40(c) "abolishes the so-called pauper petitions." The committee concluded that because under the old system it was the widespread practice of referees ultimately to demand and obtain payment of fees in "pauper" proceedings, a system allowing for the payment of fees by installment in meritorious cases would be a desirable substitute for the former pauper provisions. S. Rep. No. 959, 79th Cong., 2d Sess., p. 7.

Elimination of the filing fee requirement would thwart the Congressional intent that the bankruptcy system be self-sustaining. The most recent figures show that of the 166,338 non-business bankruptcies terminated in 1969, more than 64 percent of these (107,481) were cases in which the bankrupt had no non-exempt assets. *Tables of Bankruptcy Statistics*, Administrative Office of United States Court, February 1971. The loss to the Referees' Salary and Expense Fund if filing fees cannot be required for indigents has been estimated at $3 million (see *In re*

[4] Prior to the 1946 revisions, each referee met his expenses and received compensation by collecting fees in the cases before him. For several reasons, Congress determined that such a fee-compensation system was undesirable. See S. Rep. No. 959, 79th Cong., 2d Sess., p. 2.

Garland, supra, 428 F. 2d at 1188), an expense that would have to be borne either by other bankrupts or by the general revenues.

2. Contrary to the district court's conclusion, the mandatory filing fee provisions of the Bankruptcy Act does not violate the due process clause of the Fifth Amendment.

(a) The right of a voluntary petitioner in bankruptcy to a discharge of his debts is not a fundamental or constitutionally-mandated right such as the right to vote or to travel freely. *In re Garland, supra,* 428 F. 2d at 1188; see *In re Zidoff,* 309 F. 2d 417, 419 (C.A. 7); compare *Shapiro* v. *Thompson,* 394 U.S. 618; *Harper* v. *Virginia Board of Elections,* 383 U.S. 663; *Griffin* v. *Illinois,* 351 U.S. 12. Pursuant to Article I, Section 8 of the Constitution, Congress has the power "To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." Congress has the power to determine whether or not there shall be bankruptcy laws, and, indeed, for long periods in the nation's history, Congress did not provide any bankruptcy law at all.[5] Moreover, "Congress may prescribe any regulations concerning discharge

[5] Prior to the present Bankruptcy Act, passed in 1898, the nation was without a federal bankruptcy law except for three short periods. An early Act, which did not permit voluntary petitions and conditioned discharge on the consent of creditors, was passed in 1800 and repealed in 1803. 2 Stat. 19, c. 19; 2 Stat. 248, c. 6. A second Act permitting voluntary bankruptcies was passed in 1841 and repealed in 1843. 5 Stat. 440, c. 9; 5 Stat. 614, c. 82. A third Act was passed in 1867 and repealed in 1878. 14 Stat. 517, c. 176; 20 Stat. 99, c. 160.

in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law * * *". *Hanover National Bank* v. *Moyses,* 186 U.S. 181, 192; accord: *United States* v. *Fox,* 95 U.S. 670, 672.

Where no fundamental constitutional right is involved, this Court has held that when dealing with "a withholding of a noncontractual benefit under a social welfare program"

> we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Flemming v. *Nestor,* 363 U.S. 603, 611. See also *Dandridge* v. *Williams,* 397 U.S. 471, 485.

As the First Circuit held in *In re Garland, supra,* the classification created by the fee provisions has a reasonable basis. Since Congress had determined that many persons who had filed petitions prior to 1946 without paying the filing fees later paid them, it was warranted in replacing the provision of former Section 51(2) for waiver of filing fees for indigent persons with the present provision for the installment payment of fees (Section 52(a)). Under this system, as implemented by this Court, the $50 filing fee can be paid over six months and for good cause, the period may be extended to nine months. Payment of $50 over a six-month period amounts to only $1.92 per week. While providing adequate relief for the needy, the installment system aids the financial integrity of the self-

supporting bankruptcy system by protecting it against specious claims of poverty.*

(b) The refusal to grant a discharge in bankruptcy except upon the payment of the minimal filing fees does not involve the denial of "access to [the] courts" which underlay this Court's decision in *Boddie* v. *Connecticut*, 401 U.S. 371, 374, that a state cannot refuse to entertain an action for divorce by an indigent who cannot pay the court filing fees and expenses of service of process.

As the First Circuit pointed out in *In Re Garland*, *supra* (428 F. 2d at 1187):

> * * * [O]ne reason we would give for distinguishing this case from ordinary litigation, is that the "statutory fees * * * are primarily for services for the benefit of the bankrupt." *In re Bean* [100 Fed. 262, 263 (D. Vt.)]. Although bankruptcy is administered in a "court" it is in most particulars a very unusual court. "The core of bankruptcy is administrative." *St. Regis Paper Co.* v. *Jackson*, 5 Cir., 1966, 369 F. 2d 136, 141. Referees are primarily administrators who, together with trustees, render financial services. A bankruptcy is not litigation in the normal understanding of the term, but merely a process under which the bankrupt

* The fact that before 1946 so many persons initially claiming inability to pay filing fees later paid them (see S. Rep. No. 959, 79th Cong., 2d Sess.) suggests that a significant portion of the initial claims may not have been justified (although, of course, many persons may have obtained the necessary funds subsequent to their initial claim of poverty). The conditioning of discharge on ultimate payment of fees makes the enforcement of the fee provisions self-policing—an important factor in the essentially non-adversary bankruptcy adjudication system.

files a petition, turns over his assets, if any, and awaits the receipt of a discharge.

A voluntary bankruptcy petition does not request legal relief in the usual sense, but rather asks the referee and trustee to administer the bankrupt's assets, if any. These are financial services which the government provides and for which it is appropriate that payment should be made.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
L. PATRICK GRAY, III,
Assistant Attorney General.
ALAN S. ROSENTHAL,
WILLIAM D. APPLER,
Attorneys.

DECEMBER 1971.

APPENDIX A

United States District Court, Eastern District of New York

(In Bankruptcy No. —— Decision and Order)

September 13, 1971

IN THE MATTER OF ROBERT WILLIAM KRAS,
PETITIONER IN BANKRUPTCY

TRAVIA, District Judge.

The petitioner moves for leave to file his petition in bankruptcy and proceed without prepayment of any of the filing fees[1] as a condition precedent to a discharge in bankruptcy. The motion comes directly to the Court before being referred to a Referee by the Clerk of the Court.

Under the Individual Assignment System presently operating in this District, new civil and criminal cases are filed in the Clerk's Office, given a docket number and then assigned, at random, to one Judge for all purposes. In a bankruptcy proceeding, "* * * the clerk shall, immediately *upon the filing* of a petition * * *, refer the case to a referee."[2] (Emphasis added). The issue in this proceeding is whether the Clerk shall file the petition without the payment of the filing fees. Since the Clerk has not filed the petition, the matter has not been referred to a referee and the issue is be-

[1] Such fees are presently required by the Bankruptcy Act, 11 U.S.C. §§ 32(b)(2), 32(c)(8), 68(c)(1), 96(g), and U.S. Supreme Court General Order in Bankruptcy 35(4).

[2] Bankruptcy Rule 2(a) E.D.N.Y.

fore this Court.[3] A decision granting the motion will, in effect, direct the Clerk of the Court to file the petition, assign the same a docket number and refer the proceeding to a Referee in Bankruptcy. A decision denying the motion will end the proceeding without giving the petitioner an opportunity to an adjudication of his rights in a bankruptcy proceeding.[4]

According to his affidavit submitted in support of the motion,[5] petitioner lives in a two and one-half room apartment with his wife, his two young children, his mother and her young child. His younger child has cystic fibrosis and, at about the time the affidavit was prepared, was in Cumberland Medical Center. Except for some minor odd jobs, petitioner has been unemployed since May 1969. His last steady employment was as an insurance agent for Metropolitan Life Insurance Company (hereafter "Metropolitan") from which he was discharged because premiums which he had collected were stolen from his home and he was unable to make up the amount. Petitioned has since attempted to secure employment but has been unsuccessful because of bad reference given by Metropolitan. Petitioner's wife was employed until March 1970 when she had to stop working because of her pregnancy. She will be unable to work since all of time will be spent caring for the younger child.

[3] The Court's research indicates that this is the first proceeding involving this issue which has not first been presented to a referee for decision. See *In re Garland*, 428 F. 2d 1185 (1st Cir. 1970), *cert. denied*, 39 U.S.L.W. 3487 (May 4, 1971); *In the Matter of Smith*, 323 F. Supp. 1082 (D. Colo. 1971); *In Richard Partilla*, Bankruptcy No. 71-B-380 (S.D.N.Y., pending before Referee Babitt).

[4] Of course, such a decision would not affect whatever appellate rights petitioner might have.

[5] Since the factual allegations in the affidavit have not been challenged, they will be accepted as true.

Petitioner's present financial picture is not pleasant, to say the least. He and his family, including his mother and her daughter, live on a public assistance allotment of $366.00 per month. All of this amount is required for rent and the necessities of life. Petitioner alleges his owns no non-exempt assets and that his only assets consist of $50.00 worth of essential household goods and clothing which are exempt from distribution under 11 U.S.C. § 24 and New York C.P.L.R. § 5205(a). Because of these circumstances, petitioner claims he is unable to pay the filing fee and cannot promise to pay the fee in installments.[6] Neither the New York City Department of Social Services nor family, relatives, or friends have been able to help petitioner raise the money to meet the cost of filing the petition. Petitioner seeks a discharge in bankruptcy of his indebtedness in the amount of $6,428.69 and states as his reason, among other things, "* * * in order to get a new start in life."[7] He especially seeks a discharge of his indebtedness to Metropolitan to improve his chances of securing employment elsewhere.

To secure relief, petitioner makes both statutory and constitutional arguments.[8] In view of the long established practice of refraining from passing on the

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[6] Provision for installment payments over a period as long as nine months is made by General Order 35(4).

[7] Petitioner's affidavit, p. 3.

[8] Because of the claims of unconstitutionality, petitioner has submitted the notice required by Rule 24, General Rules, E.D.N.Y. Rule 24, applicable to cases where the United States is not a party, requires a party challenging the constitutionality of an Act of Congress to give notice of such fact to the Court "* * * to enable the Court to comply with 28 U.S.C. §2403. * * *" Section 2403 provides for judicial certification to the Attorney General when the constitutionality of an Act of Congress is drawn in question. This Court, by letter dated

constitutionality of Acts of Congress unless compelled to do so, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936, Brandeis, J. concurring), petitioner's statutory claim will be dealt with first.

I

Petitioner argues that the Bankruptcy Act should be liberally construed in view of its broad remedial purpose and that the federal in forma pauperis statute, 28 U.S.C. § 1915(a), should be applied to bankruptcy proceedings in accordance with such construction. On its face, petitioner's argument possesses some merit. Section 1915(a) provides:

> "Any Court of the United States may authorize the commencement, prosecution or defense of *any suit, action or proceeding,* civil or criminal, or appeal therein, *without prepayment of fees* and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress." (Emphasis added).

As petitioner states, "By its own terms this statute is as applicable to bankruptcy proceedings as to any other proceedings in federal court."[9] And since the filing fee in bankruptcy, $50.00,[10] is much greater

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June 2, 1971, certified to the Attorney General that the constitutionality of several sections of the Federal Bankruptcy Act, viz., 11 U.S.C. §§ 32(b)(2), 32(c)(8), 68(c)(1), 95(g) and U.S. Supreme Court General Order in Bankruptcy 35(4) was drawn in question. On July 2, 1971, the Attorney General's Office replied that it wished to intervene as amicus curiae, and on August 3, 1971, submitted a brief in opposition to this motion.

[9] Petitioner's Memorandum, p. 7.

[10] The fee is $40.00 in no-asset cases. 11 U.S.C. § 76(c).

than that in other civil litigation, generally $15.00,[11] the need for the application of § 1915 to bankruptcy proceedings is obvious. Petitioner further argues that nothing in the Bankruptcy Act or the General Orders—

> "specifically requires that persons must pay the filing fee as a prerequisite to discharge even if they are so poor that they do not have at the time of filing and cannot hope to have over 9 months enough non-essential assets to pay any part of the filing fees."[12]

Except for evidence that Congress intended to require payment of filing fees as a condition precedent to discharge bankruptcy, this Court might be inclined to grant petitioner's motion on the ground that § 1915(a) is applicable to bankruptcy proceedings. That evidence, however, compels this Court to reject petitioner's statutory argument.

The Bankruptcy Act of 1898 provided for a waiver of fees at the time of the filing of the petition on an affidavit of inability to pay.[13] In 1946, Congress passed the Referees' Salary Bill[14] which did away with bankruptcy petitions in forma pauperis. The Senate Report on that Bill stated:

> "Under the existing statutory provisions a bankrupt is permitted to file a petition without the payment of any filing fees where he accompanies it with an affidavit indicating his inability to pay them. In such instances, however, many of the referees have later collected the filing fees in installments from the bankrupts. It is deemed desirable in lieu of the present widespread practice of demanding payments ultimately, to abolish pauper petitions.

[11] 28 U.S.C. § 1914.

[12] Petitioner's Memorandum, pp. 6–7.

[13] Cr. 541. §§ 40(c), 51(2).

[14] 11 U.S.C. § 68.

> It seems more advisable to provide for installments in meritorious cases, and to leave the exact procedure for incorporation in the general order of the Supreme Court." [15]

Although the Senate's reasoning has been criticized,[16] it is difficult for this Court to say that Congress was unaware of the effect its action would have upon paupers' petitions. Congress knowingly deleted from the new law the former paupers' provision and substituted the requirement that a bankrupt who asserts contemporaneously with the filing of his petition that he cannot pay the fee, may pay in installments, but must pay ultimately as a condition precedent to discharge. 11 U.S.C. §§ 32(b), 32(c)(8), 68(c)(1), 95(g); General Orders in Bankruptcy 35(4)(c), 331 U.S. 873, 877.

A similar conclusion has been reached in the two other cases which have considered this issue. *In re Garland* and *In the Matter of Smith*, both *supra*, at note 3. Chief Judge Aldrich stated in the opinion of the Court, *In re Garland*, "Of more basic importance, Section 1915(a) provides for waiver of prepayment only, not for forgiveness. See section 1915(e). It cannot be read to eliminate a requirement of ultimate payment phrased as a condition precedent."

This Court agrees with the reasoning of the *Garland* and *Smith* cases on this issue.

Having disposd of petitioner's statutory claims, the Court now turns to the more difficult constitutional questions petitioner raises.

First, petitioner argues that the provisions of the Bankruptcy Act which condition a discharge in bank-

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[15] S. Rep. No. 959, 79th Cong., 2d Sess. 7 (1946).

[16] Shaeffer, *Proceedings in Bankruptcy in Forma Pauperis*, 1969 Colum. L. Rev. 1203, 1211.

ruptcy upon payment of a filing fee [17] deprive him of his Fifth Amendment rights to due process and equal protection of the laws.

This issue is one of first impression in this Circuit.[18] However, two other federal courts have faced the constitutional questions. In *In re Garland* [19] decided on July 8, 1970, the First Circuit, in a unanimous decision, held that the constitutional requirement of payment of a filing fee before receiving a discharge in bankruptcy does not amount to a denial of due process. More recently, on February 24, 1971, the Colorado District Court in *In the Matter of Smith* [20] disagreed with the conclusion of the First Circuit and found that the filing fee requirement of the Bankruptcy Act as applied to an indigent petitioner constituted a denial of equal protection. Thus, this Court is faced with conflicting judicial decisions, and since neither the Supreme Court nor our own Court of Appeals has ruled directly on the question, it is free to adopt that solution which it feels the Constitution requires.

At the outset, it should be noted that neither the *Garland* nor the *Smith* courts had the benefit of the Supreme Court's opinions in *Boddie* v. *Connecticut*,[21] decided on March 2, 1971. In *Boddie*, a majority of the Supreme Court relied on the Due Process Clause to strike down a Connecticut statute which had the

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[17] See note 1, *supra*, p. 2.

[18] Apart from *A. Richard Partilla*, 71-B-380, pending before a Referee in the Southern District. Se note 3, Supra, p.2.

[19] 428 F.8d 1185 (1st Cir. 1970), *cert. denied*, 401 U.S. —— (1971), 39 U.S.L.W. 3487.

[20] 323 F.Supp. 1082 (D. Colo. 1971).

[21] 401 U.S. —— (1971), 39 U.S.L.W. 4294. (See also *Tate* v. *Short*, 401 U.S. —— (1971), 39 U.S.L.W. 4301.

effect of denying individuals access to its divorce courts solely because of the inability of an individual to pay filing fees and process costs. Since there was no dispute as to applicants' inability to pay or their "good faith" in seeking a divorce, the Court reached the constitutional issue. Speaking for the majority, Mr. Justice Harlan said:

> "* * * we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one * * *
>
> Prior cases establish, first, that due process requires at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[11]

In concurring, Mr. Justice Douglas preferred to base his decision on the Equal Protection Clause. Poverty was the invidious criterion Connecticut used in determining who might seek a divorce. Mr. Justice Brennan relied on both the Due Process and Equal Protection Clauses:

> "Certainly, there is at issue the denial of a hearing, a matter for analysis under the Due Process Clause. But Connecticut does not deny a hearing to everyone in these circumstances; it denies it only to people who fail to pay certain

[11] Id. at 4295.

> fees. The validity of this partial denial, or differentiation in treatment, can be tested as well under the Equal Protection Clause." [23]

On May 3, 1971, the Supreme Court denied certiorari in *In re Garland,* three Justices dissenting.[24] Such denial may have resulted from the Court's desire to proceed "slowly step-by-step, so that the country will have time to absorb its [Boddie's] full import." [25] But, for whatever reason, the Court's denial of certiorari is not to be taken as a decision on the merits of the case, *United States* v. *Carver,* 260 U.S. 482, 490 (1923), and this Court remains free to chart its own course. That course, however, is not without guideposts, particularly in view of the statements of Mr. Justice Black and Mr. Justice Douglas dissenting from the denial of certiorari in *In re Garland.* Although ironically Mr. Justice Black was the lone dissenter in *Boddie,* he feels that if that case is now the law, it should not be limited to divorce. Both Mr. Justice Black and Mr. Justice Douglas would have reversed outright. As Mr. Justice Black said:

> "The opinion in Boddie attempts to draw two distinctions between divorce and other disputes. The Court there stated that access to the judicial process in divorce matters is the 'exclusive precondition to the adjustment of a fundamental human relationship * * *.' The two elements then that require open access to the courts are that the judicial mechanism be the 'exclusive' means of resolving the dispute and that the dispute involve 'fundamental' subject matter. The first element—'exclusiveness' of the judicial process as a remedy—is no limitation

[23] Id. at 4299.

[24] Justices Black, Douglas and Brennan, 39 U.S.L.W. 3487.

[25] Mr. Justice Black's dissent from the denial of certiorari in *In re Garland,* 39 U.S.L.W. 3483.

at all. The States and the Federal Government hold the ultimate power of enforcement in almost every dispute * * *. Thus, the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force.

The other distinction between divorce and different kinds of controversies suggested in the Boddie opinion is the degree to which the disputes are regarded as 'fundamental.' The extent to which this requirement limits the holding of Boddie is found in the very facts of that decision—the right to seek a divorce is simply not very 'fundamental' in the hierarchy of disputes * * *. And since Boddie held that the right to a divorce was 'fundamental,' I can only conclude that almost every other kind of legally enforceable right is also fundamental to our society * * *. Even the need to be on the welfare rolls or to file for a discharge in bankruptcy seems to me to be more 'fundamental' than a person's right to seek a divorce * * *. For this Court to have first provided for governmental assumption of civil court costs in a divorce case seems to me a most unfortunate point of departure. But since that step has now been taken, I would either overrule Boddie at once or extend the benefits of government paid costs to other civil litigants whose interests are at least as important to an orderly society." [26]

Mr. Justice Douglas, relying on the Equal Protection Clause as he did in Boddie, stated:

"Today's decisions underscore the difficulties with the Boddie approach. In Boddie the majority found marriage and its dissolution to be fundamental as to require allowing indigent access to divorce court without costs. When indigency is involved I do not think there is a hierarchy of interests. Marriage and its dis-

[26] Id.

> solution are of course fundamental * * *. *Similarly obtaining a fresh start in life through bankruptcy proceeding or securing adequate housing and the other procedures in these cases violate the Equal Protection Clause* * * *[27] (Emphasis added.)

This Court can only agree that a proper interpretation of *Boddie* requires that, as applied to petitioner herein, the statutory requirement of prepayment of a filing fee to obtain a discharge in bankruptcy violates his Fifth Amendment right of due process, including equal protection. In so concluding, this Court notes its disagreement with the First Circuit's discussion of the constitutional issues in *Garland*. There the Court treated the question not as involving access to a civil court but rather as involving an individual's right to a bankruptcy discharge. Such right, the Court decided, was not a "fundamental right, but a privilege" to which Congress may attach reasonable conditions. In light of *Boddie*, it is difficult to accept this rationale. Perhaps the *Garland* Court treated the question in this manner because it looked upon the filing fee as being "primarily for services for the benefit of the bankrupt"[28] and because it looked upon bankruptcy "not [as] litigation in the normal understanding of the term, but merely [as] a process under which the bankrupt files a petition, turns over his assets, if any, and awaits the receipt of a discharge."[29] While this is certainly an apt description of the mechanics of a bankruptcy proceeding, this Court finds more convincing the District Court opinion in *In re Smith*:

> "* * * we believe what is at stake here is not simply bankruptcy but access to court. So viewed, the question presented takes on a great-

[27] Id. at 3484.
[28] 428 F. 2d 1185, 1187.
[29] Id.

> er significance, at least for those of us who are trained in the law and who regard the legal system as fundamental to our way of life."[30]

This "greater significance" compels this Court to conclude that the statutory requirement of the payment of filing fees as a condition precedent to obtaining a discharge in bankruptcy is unconstitutional as applied to this petitioner.[31]

In so ruling, this Court accepts the petitioner's affidavit of indigence in the absence of evidence to the contrary. In view of the statement of petitioner's financial condition contained therein,[32] it seems unnecessary to decide whether petitioner need sell any exempt assets to obtain money for filing or whether a more stringent standard be adopted for indigency in the constitutional sense as opposed to the standard applied to § 1915 cases.[33] However, that is not to say that petitioner's status as an indigent will be forever unchallenged. The trustee is charged with the duty

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[30] F.Supp. 1082, 1087; *see also Griffin v. Illinois*, 351 U.S. 12 (1956).

[31] In their brief, the Government cites the case of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949) for the proposition that Congress may constitutionally decide to provide benefits only to those persons who pay costs related to the benefit granted, such as discharge of debts. Reliance on the *Cohen* case is misplaced. The *Cohen* case considered the constitutionality of a statute on its face; this case involves a statute only as it applies to this petitioner. See also *Boddie*, n. 9.

[32] Petitioner's affidavit states that "[t]he sole assets which I possess are $50 worth of essential household goods and wearing apparel which are exempt from distribution in bankruptcy pursuant to 11 U.S.C. § 24 and CPLR § 5205. I also have a couch in storage on which are owed payments of $6 per month and which has negligible market value.

[33] See the thorough discussion of indigency in *In re Smith*, *supra*, at 1091–93.

of examining the bankrupt."[34] Additionally, as the Court in *Smith* concluded, the Referee's decision should make provision for the survival of petitioner's obligation to pay the filing fee.[35] Thus, the fear expressed in *Garland* ("It is easy for him to deny [having sufficient funds to pay the fee], and difficult to prove otherwise. * * * [A] very substantial number of persons who could in fact pay, will avoid doing so")[36] can be minimized. Moreover, the same problem exists in the other areas of civil litigation where § 1915(a) applies. There is no justification for allowing the mere potential for abuse of control in the constitutional area.

Secondly, this leads to a basic objection to allowing petitioner to file—the Government's fiscal interest in supporting the bankruptcy system. The petitioner in *Garland* estimated that allowing filing without payment of fees would result in a revenue loss of $3,000,000 annually.[37] Such a loss would certainly be at odds with the self-financing arrangement of the bankruptcy system. Yet, it is noteworthy that since 1966 that system has not been self-financing. The most recent figures reveal that for the 1970 fiscal year, the deficit in the Referees' Salary and Expense Fund amounted to $4,531,466, twice that of the deficit of the

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[34] U.S.C. § 75(a).

[35] The full statement of the *Smith* court on this point reads: "We think it would be constitutionally permissible, and also appropriate, for the referee, at the final disposition of this case, to fashion an order resembling a judgment for costs, which order would provide that petitioner's obligation to pay the filing fee is not permanently discharged but would arise again if and when she is no longer indigent and can pay the fee without undue hardship." (323 F. Supp. 1092, 1093).

[36] 428 F.2d 1185, 1188.

[37] *Cf. Shaeffer*, *supra*, note 16 at p. 8.

previous year.[38] The apparent difficulty, if not impossibility, of keeping the system current prompted the Judicial Conference to conclude that the principle of a self-supporting bankruptcy system is outmoded and should be abandoned.[39] The Director was authorized to draft an amendment to 11 U.S.C. § 68 to abolish the self-supporting aspect of the system. With the self-supporting feature of the bankruptcy system in jeopardy under the present fee schedule, it is clear that either those fees will have to be raised substantially or society in general will be required to bear a larger burden of the costs of the bankruptcy system. With the filing fees in bankruptcy already greater than the fees in other civil litigation in the federal courts, the latter alternative seems the wiser. However, it is not for this Court to predict the outcome of future changes in the bankruptcy system. Rather, it is this Court's conclusion that the Government's fiscal interest in the filing fee requirement is not a compelling interest. Such conclusion is supported by Mr. Justice Harlan's statement in *Boddie*:

> "In our opinion, none of these considerations [including the state's interest in allocating its financial resources] is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages."[40]

In requiring adherence to the compelling interest standard, this Court is not unmindful of the Government's argument that the less stringent "reasonable basis" test should be employed. However, like the

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[38] 1970 Annual Report of the Director, Administrative Office of the United States Courts, V-16.

[39] Report of the Judicial Conference, March 1969, pp. 23–25.

[40] 401 U.S. —— (1971), 39 U.S.L.W. 4294, 4297.

Smith court, this Court holds the Government to the more stringent equal protection test the compelling government interest test, as enunciated by the Supreme Court in *Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969). In *Shapiro,* Justice Brennan held that where a fundamental right is involved, the constitutionality of the statute in question "must be judged by the stricter standard of whether it promotes a compelling state interest."[41] This Court agrees with the court in the *Smith* case that what is at stake here is not simply bankruptcy but access to court, a fundamental interest. Moreover, this Court is moved to its conclusion by the language of Justice Black dissenting from the denial of certiorari in the *Garland* case. He stated, with reference to the *Boddie* case, that:

> "Even the need to file for a discharge in bankruptcy seems to me to be more *'fundamental'* than a person's right to seek divorce * * *. And bankruptcy is designed to permit a man to make a new start unhampered by over-whelming debts in hopes of achieving a useful life." (Emphasis added).[42]

Thus, considering the right of access to the court to seek discharge in bankruptcy in light of the Supreme Court's treatment of the right to seek divorce in the *Boddie* case and in light of the reasoning in the *Smith* case, this Court can only conclude that what is at stake here is a fundamental interest requiring compliance with the "compelling government interest" standard.

The final justification for the fee requirement comes from the desire to prevent frivolous petitions. Such

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[41] 394 U.S. 618, 638.
[42] 239 U.S.I.W. 3483.

desire can have no effect on this case, since it is undisputed that the petitioner seeks to file his petition and obtain a discharge in good faith. And, as petitioner points out:

> "* * * there is presently in effect a mechanism fully adequate for discouraging frivolous petitions which waste the time of the bankruptcy court—namely, the established principle that the effect of a dismissal of a bankruptcy proceeding for whatever reason bars by res judicata an attempt to have the scheduled debts discharged in any subsequent proceeding." [43]

Accordingly, for the reasons set forth above, it is ORDERED that petitioner's motion for leave to file his petition in bankruptcy without prepayment of any of the filing fees is granted and the Clerk of this Court is directed to accept said petition for filing and to refer the same to a Referee in Bankruptcy without prepayment of any filing fee.

ANTHONY J. TRAVIS,
U.S. District Judge.

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[43] Petitioner's Memorandum, p. 17.

APPENDIX B

United States District Court, Eastern District of New York

(In Bankruptcy No. 71 B 972)

IN THE MATTER OF ROBERT WILLIAM KRAS, BANKRUPT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States of America, Intervenor in the above-captioned action, hereby appeals to the Supreme Court of the United States from the order entered in this action on September 13, 1971, granting the bankrupt's motion for leave to file his petition in bankruptcy without prepayment of any filing fee.

This appeal is taken pursuant to 28 U.S.C. §§ 1252 and 2101.

ROBERT A. MORSE,
United States Attorney
Eastern District of NewYork
Attorney for United States,
Intervenor-Appellant
225 Cadman Plaza East
Brooklyn, New York 11201.

By (S) MARY P. MAGUIRE,
Assistant U.S. Attorney.

APPENDIX C

The Bankruptcy Act, 11 U.S.C. 1 *et seq.*, provides in relevant part:

Section 14(b), 11 U.S.C. 32(b):

(b)(1) The court shall make an order fixing a time for the filing of objections to the bankrupt's discharge and a time for the filing of applications pursuant to section 35(c)(2) of this title to determine the dischargeability of debts, which time or times shall be not less than thirty days nor more than ninety days after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 94(b) of this title. The Court may, upon its own motion or, for cause shown, upon motion of any party in interest, extend the time or times for filing such objections or applications.

(2) Upon the expiration of the time fixed in the order * * * or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this title have been paid in full; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States Attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

Section 14(c)(8), 11 U.S.C. 32(c)(8):

(c) The court shall grant the discharge unless satisfied that the bankrupt has * * * (8) has

[sic] failed to pay the filing fees required to be paid by this title in full * * *.

Section 40(c)(1), 11 U.S.C. 68(c)(1):

(c)(1) Except as otherwise provided in this title, there shall be deposited with the clerk, at the time the petition is filed in each case, and at the time an ancillary proceeding is instituted, $37 for each estate for the referees' salary and expense fund, as herein below established: *Provided, however,* That in cases of voluntary bankruptcy such fee, as well as the filing fees of the clerk and trustee, may be paid in installments, if so authorized by General Order of the Supreme Court of the United States.

Section 48(c), 11 U.S.C. 76(c):

The compensation of trustees for their services, payable after they are rendered, shall be a fee of $10 for each estate, deposited with the clerk at the time the petition is filed in each case, except where installment payments may be authorized pursuant to section 68 of this title * * *.

Section 52(a), 11 U.S.C. 80(a):

(a) Clerks shall charge and collect for their services to each estate, whether in a court of primary or ancillary jurisdiction, a filing fee of $3. The clerk may collect this amount in installments when such installment payments have been authorized by General Order of the Supreme Court of the United States.

Section 59(g), 11 U.S.C. 95(g):

(g) A voluntary or involuntary petition shall not be dismissed upon the application of the petitioner or petitioners, or for want of prosecution, or by consent of parties, until after notice of the creditors as provided in section 94 of this title, and to that end the court shall, upon entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, shall

cause such notice to be sent to the creditors of the pendency of such application and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard. If the bankrupt shall fail to file such list within the time fixed by the court, such list may be filed by the petitioning creditors according to the best of their knowledge, information, and belief: *Provided, however,* That in the case of a dismissal for failure to pay the costs of the bankruptcy proceedings, such notice of dismissal shall not be required.

Supreme Court General Order in Bankruptcy 35(4) provides:

(4) The petition in a voluntary proceeding under Chapters I to VII or Chapter XIII of the Act may be accepted for filing by the clerk if accompanied by a verified petition of the bankrupt or debtor stating that the petitioner is without and cannot obtain the money with which to pay the filing fees in full at the time of filing. Such petition shall state the facts showing the necessity for the payment of the filing fees in installments and shall set forth the terms upon which the petitioner proposes to pay the filing fees.

a. At the first meeting of creditors or any adjournment thereof, the court after hearing and examination of the bankrupt or debtor, shall enter an order fixing the amount and date of payment of such installments. The final installment shall be payable not more than six months after the date of filing of the original petition; provided, however, that for cause shown the court may extend the time of any installment for a period not to exceed three months.

b. Upon the failure of a bankrupt or debtor to pay any installment as ordered, the court

may dismiss the proceeding for failure to pay costs as provided in Section 59(g) of the Act. If a proceeding is dismissed or closed without the payment of the filing fees in full, the amount collected in installments, including any payment made at the time the original petition is filed, shall be divided between the clerk, the referees' salary fund, the referees' expense fund and the trustee, if any, in the same proportion as such filing fees would be distributed if paid in full.

c. No proceedings upon the discharge of a bankrupt or debtor shall be instituted until the filing fees are paid in full.

U.S. GOVERNMENT PRINTING OFFICE: 1971